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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

NO. 76

UNITED STATES OF AMERICA, PETITIONER

v.

STEPHEN ROBERT DEMKO

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR RESPONDENT

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COUNTER STATEMENT OF QUESTION INVOLVED

Are the rights of federal prisoners to maintain suits for negligence under the broad and sweeping policy of the Federal Tort Claims Act to be obliterated by virtue of a sketchy and severely restricted compensation system promulgated both prior and subsequent to the enactment of the Federal Tort Claims Act and when Congress never expressed such intention in the compensation statute?

Additional Statement

Respondent accepts the government's statement of the case with these additional details.

Respondent was an inmate of the Lewisburg Penitentiary, Lewisburg, Pennsylvania, pursuant to a sen-

tence imposed by the United States District Court for the Western District of Pennsylvania, for interstate transportation of fraudulent checks, having begun to commence the service of this sentence in June of 1960. It further appears that approximately one week before March 12, 1962, which is the date on which the accident occurred, that respondent was placed on the sick list at the Lewisburg Penitentiary and was receiving medical treatment for flu.

On March 12, 1962 at about 10:00 A.M., at the direction of James Hall, Construction Supervisor, respondent was ordered to replace blownout windows in the Lewisburg Penitentiary Power Plant. He was directed to perform this activity because of his previous carpentry experience. Respondent indicated to the construction supervisor that he intended to go on sick call that morning in order to receive penicillin shots but Hall, nevertheless, insisted that he perform the assignment immediately.

Respondent was required to replace blown out windows on one wall of the Power House, which were elevated approximately 15 feet from the floor thereof. No scaffolding or step ladder equipment was provided. The only available medium to climb up the wall were steel beams which ran horizontally to the floor at distances of approximately 4 to 5 feet apart. These beams were about 8 inches in depth. The wall itself was composed of smooth yellow tile, which that day was wet from rain and snow which had been blown in from the broken window openings. Respondent precariously balanced himself on an angle iron cross bar, placing one hand against the wall and with the other hand attempted to manipulate a 40 x 60 inch plate of glass into

a rubber gasket through the use of a screwdriver. While respondent attempted to balance himself in this position and insert the glass into the gasket, the glass broke, catapulting respondent to the outside and causing him to fall to the ground below for a distance of approximately 37 feet.

Respondent, age 35, has a high school education and is a carpenter by profession, having performed carpentry work since he was 15 years of age. He is both a rough and finished carpenter.

As a result of the fall, aside from serious head and facial injuries, he suffered comminuted fractures of the ankle and tibia of the right foot as well as injuries to his back and spine. His right ankle has been fused. He cannot walk upgrade and must hold on when walking up steps. He is unable to do any climbing.

Respondent is totally and permanently injured and is incapable of performing his profession as a carpenter for the rest of his life.

As a finished carpenter his profession would net him from $9,000.00 to $15,000.00 per annum or an income of $750.00 to $1,250.00 per month.

Perhaps it might be argued that respondent, sensing the manifest danger of the assignment—as any federal employee might have done—should have refused to ascend the perilous height without the assistance of tools and normal devices required to perform the work in a safe manner. Refusal to perform this task or any other assignment, no matter how ill-conceived, would have meant his being placed in the "hole" under solitary confinement.

Summary of Argument.

It is noteworthy that *respondent is not seeking two recoveries,* but is asking for an amount sufficient to adequately compensate him for his injuries. It is stipulated that $20,000.00, which is the amount of the stipulated judgment, *in addition* to the compensation already paid and to be paid respondent in the future would adequately compensate respondent for the injuries sustained.

No prejudice could possibly arise where compensation has been paid to a prisoner in a work connected injury who has received an award for injuries in view of the practice of the United States Courts to require the return of such compensation and/or a corresponding reduction in the award. This Court is amply aware of the numerous Jones Act cases where this procedure has been followed.

SUMMARY OF ARGUMENT

I

This court has unequivocably concluded that suits under the Federal Tort Claims Act can be maintained by Federal prisoners for personal injuries sustained during confinement in prison by reason of negligence of government employees. *United States v. Muniz,* 374 U.S. 150, 26 U.S.C. 1346(b).

II

The government's contention, that inmates entitlement to compensation violates a fundamental rule that one remedy against the government for each wrong suffered, is without merit. In *Brooks v. United States,*

387 U.S. 49 and *United States v. Brown,* 348 U.S. 110, this Court on different occasions upheld the proposition that a recovery can be achieved under the Tort Claims Act concurrently with the existence of a compensation system designed to cover the same injury. It was concluded in these cases that provisions in other statutes for disability payments to servicemen and gratuity payments to their survivors which exist without making such payments exclusive or providing for an election of remedies indicate no purpose to forfeit action against the United States under the Tort Claims Act.

Congress, of course, has the right to make a compensation act an exclusive remedy; but where Congress, by an examination of its intention, has given no indication that it has made the right of compensation an exclusive remedy should not arbitrarily have foisted upon it an interpretation which vitiates the broad and sweeping policy of the Federal Tort Claims Act.

III

The government's reliance upon *Feres v. United States,* 340 U.S. 135, wherein this Court denied recovery under the Tort Claims Act holding that the government is not liable under that Act for injuries to servicemen arising in a course of activity incident to military service involves the "peculiar and special relationship of the soldier to his superiors", and is not analogous to a suit by a federal prisoner. An examination of the reasons for the *Feres* decision reveals why an argument persuasive with soldiers injured in the course of duty is not persuasive with federal prisoners. *United States v. Muniz,* 374 U.S. 150.

IV

The prison compensation system is an inadequately comprehensive compensation system sufficient to indicate an intention on the part of Congress to preempt the sweeping provisions of the Federal Tort Claims Act by reason of its sketchy, discretionary and highly restrictive provisions, 18 U.S.C.A. 4126. Simply because the Federal Employees Compensation Act precludes recovery under the Tort Claims Act does not require that all Federal Compensation Systems be interpretated as providing the exclusive remedy.

The holding in *Johansen v. United States,* 343 U.S. 427, precluded the plaintiff from recovering under the Public Vessels Act for the reason that coverage existed under the Federal Employees Compensation Act which is such a comprehensive compensation program as by its very nature presumed to provide an exclusive remedy. The prisoners compensation system, unlike the Federal Employees Compensation Act, does not provide a system of "simple, certain and uniform" compensation for injuries or death.

V

This Court has enunciated the doctrine that it will not pronounce an election of remedies when Congress has not done so. *Brooks v. United States,* 337 U.S. 19. Congress intended those exceptions which are outlined with extreme particularity under the Tort Claims Act and provisions in other statutes dealing with disability payments in no way necessarily indicates an intention on the part of Congress to forfeit tort actions under the Tort Claims Act. Congress was well aware of the claims of federal prisoners and its failure to exclude

them from the provisions of the Tort Claims Act in 18 U.S.C. 2680 was deliberate. *United States v. Muniz,* 374 U.S. 150. There is no justification for this Court to read exemptions into the Tort Claims Act beyond those provided by Congress. If the Act is to be altered that is a function for the same body that adopted it. *Rayonier, Inc. v. United States,* 352 U.S. 315, 320.

For all intents and purposes the government inferentially is telling this Court to resolve all doubts against federal prisoners and to invoke the thesis that Congress intends and desires to stigmatize federal prisoners and relegate them to inferior status relative to their civil rights for tort liability. It must follow from the government's argument that enactment of any form of compensation no matter how weak, impotent, ineffective and restrictive in coverage, must constitute the sole basis of relief. That when compensation was limited to 20% of inmates engaged in prison industry, it was the exclusive remedy despite the Federal Tort Claims Act which became operative in 1946.

VI

The compensation scheme for prisoners is not "simple, certain and uniform" as to evidence a Congressional intent to provide an exclusive remedy. In comparison with the military compensation program, 38 U.S.C. 700, the prison-work compensation plan is vastly less comprehensive and is in no real sense a substitute for tort liability, and is vastly different from the right to compensation enjoyed by government employees under the Federal Employees Compensation Act.

It is permissive rather than mandatory; the amount of award is discretionary with the Attorney-General;

it is payable only upon release from prison and will be denied if full recovery occurs; no right exists to a personal physician at his physical examination; no opportunity for administrative review is available; payment is contingent upon the inmates good conduct at the time of his release. It is not all inclusive—being unavailable to inmates who are sick, the aged, those with serious physical and mental handicaps; being unavailable to inmates newly admitted and those in transit; being unavailable to inmates confined in the District of Columbia; being unavailable to inmates engaged in certain types of road construction; being unavailable to inmates suffering injuries as a result of intentional attacks of fellow inmates; being unavailable to inmates loaned to military bases; and being unavailable to inmates injured during confinement at any other time than when engaged in performance of prison industry or maintenance activity.

VII

Congress has ample reason in the interest of sound public policy to favor the right of prisoners to seek relief under the Federal Tort Claims Act. The prisoner is permitted to do nothing except under the direction of the officers of the prison and must live and work under conditions imposed on him. He is not a free agent and is completely at the mercy and whim of prison guards. What would do more to eliminate sadistic, brutal and inhumane guards from the rosters of federal penal institutions than the realization that to subject inmates to dangerous work assignments without reasonable safeguards normally provided federal employees or any other employees, would subject the government to tort liability?

ARGUMENT

I

Suits by Federal Prisoners Are Maintainable Under the Tort Claims Act

The respondent's suit in this case was premised upon the holding of the United States Supreme Court in *United States v. Muniz,* 374 U.S. 150. This Court held in that case that suits under the Tort Claims Act could be maintained by Federal Prisoners for personal injuries sustained during confinement in prison by reason of negligence of government employees. This Court reached its decision only after a careful examination of the Tort Claims Act which was passed in 1946 and amended in 1961. In the Tort Claims Act, Congress gave Federal District Court jurisdiction

> "of single actions on claims against the United States for money damages, * * * for personal injury * * * caused by the negligent or wrongful act or omission of any employee of the Government while working within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." 26 U.S.C. 1346 (b)[1]

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1 The act also provides that "the United States shall be liable, respecting the provisions of this title relating to Tort, in the same manner and to the same extent as a private individual under like circumstances." 28 U.S.C. 2674.

II

One Remedy Against the Government for Each Wrong Suffered Is Not a Universal Rule

The fact that Federal prisoners may sue under the Tort Claims Act should no longer be subject to question. The fact that a federal compensation system exists at the same time in no way is a bar to the right of prisoners to recover under the sweeping provisions of the Federal Tort Claims Act. The proposition cited to this Court by the government that there should be only one remedy against the government for each wrong suffered is by no means a universal rule. This Court on different occasions has upheld the proposition that a recovery can be achieved under the Tort Claims Act concurrently with the existence of a compensation system designed to cover the same injury.

In the case of *Brooks v. United States,* 387 U.S. 49, two brothers and their father were returning in an automobile along a public highway in North Carolina. The brothers were in the Armed Forces at the time the accident occurred. The accident occurred when their car was struck by a United States Army truck driven by a civilian employee of the Army. The plaintiffs in that case were covered under the Servicemens-Benefit Law. The government moved to dismiss their suit brought under the Tort Claims Act for the reason that the brothers were in the Armed Forces of the United States at the time of the accident and that the Servicemen's Acts provided an exclusive remedy. The Supreme Court held that provisions in other statutes for disability payments to servicemen and gratuity payments to their survivors which exist without making such payments exclusive or providing for an election of remedies as in the Federal

Employees Compensation Act, while providing for exclusiveness of remedy in specified instances indicate no purpose to forbid action against the United States under the Tort Claims Act. Therefore, in *Brooks v. United States,* supra, the plaintiffs were permitted recovery even though they were covered under an independent compensation system, which, like the Federal Prisoners Industries Act, did not provide that it was an exclusive remedy.

In *United States v. Brown,* 348 U.S. 110, the plaintiff brought a suit under the Tort Claims Act for damages for negligence for the treatment of his left knee in a Veterans Administration Hospital. The plaintiff was a discharged veteran who had injured his knee while on active duty prior to his discharge in 1944. It was during the second operation in 1951 that an allegedly defective tourniquet was used as a result of which the nerves in plaintiff's leg were seriously and permanently injured.

The government argued then, as it does now, that the plaintiffs sole relief was under a compensation system which was independent of the Tort Claims Act, being the Veterans Act. The District Court agreed with the contention of the government but the Court of Appeals reversed. On certiorari the United States Supreme Court affirmed the decision of the Court of Appeals. The Supreme Court held that the payment of compensation under the Veterans Act did not bar recovery against the United States under the Tort Claims Act for a negligent injury to a member of the armed forces which was not incident to or caused by military service. Again, in *Brown,* there were two concurrent remedies, the Tort Claims Act and Veterans Act. In

Brown, the plaintiff was receiving compensation under the Veteran's Act, yet he was not precluded from recovery under the Tort Claims Act. The *Brown* case was based upon an examination of the intention of Congress and the conclusion that Congress had given no indication that it had made the right of compensation under the Veterans Act an exclusive remedy and that Congress could, of course, make the compensation system exclusive. The Supreme Court noted that even the receipt of disability payments under the Veteran's Act did not preclude recovery under the Tort Claims Act.

III

Suits by Soldiers for Injuries in the Course of Service Are Not Analogous to Suits by Federal Prisoners

The government has suggested that the reasoning used in *Feres v. United States,* 340 U.S. 135, is applicable here, yet, it is significant that the Supreme Court felt compelled to comment on its own decision in *Feres* apparently because that decision had either been *interpreted too broadly or misinterpreted.*[2]

The *Feres* decision combined three cases. The common factor underlying the three cases was that each claimant, while on active duty and not on furlough, sustained injury due to negligence of others in the armed forces. *Feres* himself died in a fire in barracks at Camp Pine, New York, while on active duty, and

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2. "Since a number of lower courts have nevertheless reached a contrary conclusion, largely in reliance upon our decision in *Feres v. United States,* 340 U.S. 135, 71 S. Ct. 153, we deem it appropriate to make more detailed investigation into the intent of Congress. *United States v. Muniz,* 83 S. Ct. 1850, 374 U.S. 150 (1953).

negligence was alleged in quartering him in barracks which should have been known to be unsafe because of a defective heating plant and failing to maintain an adequate fire watch. The Supreme Court there denied recovery under the Tort Claims Act holding that the government is not liable under that Act for injuries to servicemen arising out of or in the course of activity incident to military service. It should be noted that the *Feres* decision did not disapproye of the Brooks case. Again, the Supreme Court felt it necessary to explain its own decision as the result of:

> "peculiar and special relationship of the soldier to his superiors, and effect of the maintenance of such suits on discipline, and the extreme results that might obtain if suits under the Tort Claims Act were allowed for negligent orders given or negligent acts committed in the course of military duty ***". *United States v. Brown,* 348 U.S. 112, 75 S.Ct. 141 (1954); *United States v. Muniz,* 83 S. Ct. 1850, 374 U.S. 150, (1963).

The reasoning supporting the decision in *Feres,* which the government urges as being persuasive, was rejected by the Supreme Court in the *Muniz* case for reason that suits by soldiers for injuries arising out of or in the course of their service simply does not present an analogous situation to a suit by a Federal prisoner. Although we find no occasion to question *Feres,* so far as military claims are concerned, the reasons for that decision are not compelling here. *United States v. Muniz,* 83 S. Ct. 1850, 374 U.S. 150 (1963). Thus, it has been made clear in the *Muniz* decision that the reasoning in *Feres* is not applicable to a situation involving Federal prisoners. An examination of the reasons cited

by the Court for the *Feres* decision reveals why an argument persuasive with soldiers injured in the course of duty is not persuasive with Federal prisoners.

Among the principal reasons articulated for *Feres* were:

(1) The absence of an analogous or parallel liability on the part of either an individual or a state;

(2) The presence of a comprehensive compensation system for service personnel;

(3) The dearth of private bills from the military;

(4) The distinctly Federal relationship of the soldier to his superiors and the Government;

(5) The variations in the State law to which the soldiers would be subjected.

We might add a sixth reason cited by the Court in *Feres*:

(6) a soldier is at a peculiar disadvantage in litigation. Lack of time and money, the difficulty if not impossibility of preparing witnesses, are only a few of the factors working to a disadvantage." *Feres v. United States,* 340 U. S. 135, 71 S. Ct. 153, (1963).

Previous judicial comment upon the pertinent argument raised by *Feres* as applicable to the Federal prisoner situation might prove interesting here.

"The first premise of the *Feres* decision was that no American law had ever—permitted a soldier to recover for negligence, against *either* his superior officers or the Government he is serving." (emphasis supplied) *Win-*

ston v. United States, 305 F. 2d 253 (1962). Circuit Judge Hincks noted that such a premise was not entirely factual as it related to federal prisoners; that suits by prisoners against jailers and local governments had been authorized prior to the passage of the Tort Claims Act, *Winston v. United States,* 305 F. 2d 253 (1962). Circuit Judge Hayes in the same case on rehearing also disagreed with the Government's contention: "This argument is not applicable to the case at bar because there is a close analogy in the *private liability of prison officials,* which is well-known in American law."

The second supporting argument in *Feres was that a comprehensive compensation system for service personnel existed.*

Recent decisions and a logical analysis of 18 U.S.C.A. 4126 clearly establishes that the prison compensation system is not an adequately comprehensive compensation system sufficient to indicate an intention on the part of Congress to preempt the sweeping provisions of the Federal Tort Claims Act by reason of the sketchy, discretionary and highly restrictive provisions of 18 U.S.C.A. 4126. This topic will be treated at a later point in this brief under heading VI

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3. *Hill v. Gentry,* 280 F.2d 88 (C.A. 8) Cert. denied, 364 U.S. 875, 81 S. Ct. 119, 5 L. Ed. 2d 96 (1960); *Asher v. Zabell,* 50 F. 818 (C.A. 5, 1892).

Further, the pertenance of *Feres* is at best questionable in view of *Rayonier* where it was said, 352 U.S. 319, 77 S. Ct. 377: "It may be that it is 'novel and unprecedented' to hold the U.S. accountable for the negligence of its fire fighters, but the very purpose of the Tort Claims Act was to waive the Government's traditional all-encompasing immunity from tort actions and to establish novel and unprecedented governmental liability."

The fourth reason supporting *Feres* was the distinctly *Federal* relationship of the soldier to his superiors and the government. Justice Hincks in *Winston v. United States,* 305 F.2d 253, at 256, found that this premise was based on considerations of military efficiency and that such considerations were irrelevant to the Government-prisoner relationship.

The brief of the Government before this Court and the decision of the Court in *Feres* repeatedly emphasized that the Tort Claims Act should be construed to fit "so far as will comport with its works, into the entire statutory system of remedies against the Government to make a workable consistent equitable hold." *Feres v. United States,* 310 U.S. 135, 71 St. Ct. 153, (1963).

Circuit Judge Hayes, speaking for the majority in *Winston v. United States,* at 268, commented: "Of course this consideration has no application whatsoever to the case at bar. Federal prisoners have, with a limited exception, no alternative means of redress and private bills on their account unquestionably demanded the attention of Congress. * * * *Thus, a rule of construction* favoring the attainment of an 'equitable hold' is *persuasive of liability."* (emphasis supplied)

After reading the *Feres, Muniz* and *Winston* decisions, the conclusion is inescapable that the Supreme Court did not feel that the reasoning used to reach the result that a serviceman while on active duty was denied recovery under the Tort Claims Act was applicable to the situation where a Federal prisoner was injured as a result of Government negligence.

IV

Because the Federal Employees Compensation Act Precludes Recovery Under the Tort Claims Act Does Not Require That All Federal Compensation Systems Be Interpretated as Providing the Exclusive Remedy

In addition to the *Feres* decision, the government has suggested that those decisions interpreting the Federal Employees Compensation Act should be heeded here. Such is plainly not the case; nor should the fact that the government has provided a detailed examination repleat with numerous citations of the situation which exists when recovery exists under the Federal Employees Compensation Act concurrently with an attempted recovery under the Tort Claims infer by the length of the discussion that the situations are analogous.

The holding in *Johansen v. United States,* 343 U.S. 427, 72 S. Ct. 849 (1952), was that the Federal Employees Compensation Act was enacted to provide for compensation for injuries to all Government employees in the performance of their duties, and that such a comprehensive plan for waiver of sovereign immunity should be regarded as providing an exclusive remedy. The result was that the plaintiff was precluded from recovery under the Public Vessels Act. The basis for the decision was a feeling by the court that there existed a system of *simple, certain,* and *uniform* compensation for injuries or death which evidenced a congressional intent to make the Federal Employees Compensation Act exclusive. The argument there was that had Congress intended to provide for recovery by another means of compensation, such recovery would have been specifically provided.

It cannot be argued that because one Federal compensation system was found, upon an examination of its language, to preclude recovery under the Tort Claims Act that all Federal compensation systems may be interpreted to be similarly exclusive. Certainly it is the case that when facts of a claim under the Tort Claims Act do not fall within any express exception, the facts must be considered in relation to the language of the act itself. *Small v. United States,* 219 F. Supp. 659 (Delaware, 1963). Secondly, it is the respondent's position that the prisoners compensation system, unlike the Federal Employees Compensation Act, does not provide a "system of simple, certain, and uniform compensation for injuries or death."

V

The Supreme Court of the United States Will Not Pronounce a Doctrine of Election of Remedies When Congress Has Not Done So and Especially When There Is no Showing of Any Congressional Intention to Establish Such Exclusive Remedy

The government seemingly argues that the doctrine which has found favor in many decisions, that there should exist a single exclusive remedy against the Government, precludes recovery under the Tort Claims Act. It has already been pointed out that this doctrine is not universal and has not always been accepted by the Supreme Court itself.

In addition to providing three instances in which the Tort Claims Act itself was the exclusive remedy, Congress qualified its waiver of Governmental immunity in 28 U.S.C. 2680 by excepting from the Act claims arising from certain Government activity. "None of

the exceptions preclude suit against the Government by prisoners for injuries sustained in prison." *United States v. Muniz*, supra.[4]

In the *Feres* decision, the court noted four possible conclusions which might be reached from an interpretation of the facts involved in wrongs incident to service whereby a claim is made under the Tort Claims Act while covered under one of the Serviceman's Acts. These conclusions:

(a) The claimant might enjoy both types of recovery.

(b) The claimant might elect which remedy to pursue, thereby waiving the other.

(c) The claimant might pursue both remedies, crediting the larger liability with proceeds of the smaller.

(d) The claimant might be denied recovery under the Tort Claims Act for the reason that the compensation and pension recovery excluded the Tort remedy.

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4 "An examination of the legislative history of the act reinforces our conclusion that Congress intended to permit such suits. For a number of reasons, it appears that Congress was well aware of claims of Federal prisoners and that its failure to exclude them from the provision of the act in 28 U.S.C. 2680 was deliberate." * * * "Considering the plain import of the statutory language of the number of prisoners claims among the individual applications for private bills leading to the passage of the Federal Tort Claims Act, the frequent mention of prisoner claims exceptions in proposed bills, and the reference among others, to New York law, which permitted recovery by prisoners, we believe it is clear that Congress intended to waive soverign immunity in cases arising from prisoners' claims." *United States v. Muniz*, 83 S. Ct. 1850, 374 U.S. 150, (1963).

The Court concluded after an examination of these four possibilities that: "There is as much statutory authority for one as for another of these conclusions." *Feres v. United States,* 340 U.S. 135, 71 S. Ct. 153, (1963).

The reasoning used in *Brooks v. United States,* 337 U.S. 49, 69 S. Ct. 918, 92 L. Ed. 1200 (1949) is also applicable. The Supreme Court then found that the exceptions to the Tort Claims Act were too lengthy and too specific to ignore. The clear fact was that Congress intended *those exceptions alone to bar claims under the Tort Claims Act.* (emphasis supplied) Just as the Court in *Brooks v. United States* found that provisions in other statutes dealing with disability payments to servicemen and gratuity payments to survivors indicated no purpose to forfeit tort actions under the Tort Claims Act so, it is submitted that no such purpose can be found under the Federal Prison Industries Act: "We *will not call either remedy in the present case exclusive nor pronounce a doctrine of election of remedies when Congress has not done so.*" (emphasis supplied) *Brooks v. United States,* 337 U.S. 49, 59 S. Ct. 918 (1949).

The Respondent's present position is perhaps best stated at page 265 of *Winston v. United States,* 305 F. 2d 253 (1962):

> "The Act lists thirteen kinds of claims as to which immunity is not waived. None of these exceptions remotely relates to claims by persons who have suffered injury while being held in a federal prison (28 U.S.C. 2680 (1958). The House Report on the bill which later became the Federal Tort Claims Act stated that:

> 'The present bill would establish a uniform system authorizing the administrative settlement of small tort claims and permitting suit to be brought on *any tort claim * * * with the exception of certain classes of torts expressly exempted from operation of the act.'* (Emphasis supplied.) H. R. No. 1287, 79th Congress, 1st Sess. 3 (1945).
>
> "The care with which Congress detailed the express exclusion from the coverage of the Act of those situations in which the right of recovery was considered undesirable (H.Rep. No. 1287, supra at 5-6 (1945)), leaves no room for the exception of additional situations which would otherwise be covered by the statute.
>
> 'There is no justification for this Court to read exemptions into the Act beyond those provided by Congress. If the Act is to be altered that is a function for the same body that adopted it.' *Rayonier, Inc. v. United States,* 352 U.S. 315, 320, 77 S. Ct. 374, 377, 1 L. Ed.2d 354 (1957).

The government advances a novel thesis of legislative construction. Since Congress promulgated legislation in 1934 for injuries suffered by inmates prior to the enactment of the Federal Tort Claims Act in 1946 and amended the inmates Compensation Act to include "work activity in connection with maintenance or operation of the institution where confined" in 1961—prior to the Muniz decision of 1963 when inmates were first recognized by the Supreme Court of the United States to be within the ambit of the Federal Tort Claims Act, the government argues that the logical sylogism follows that Congress intended compensation to be the exclusive remedy.

In other words, the government inferentially argues that the enactment of any form of compensation no matter how weak, impotent, ineffective and restrictive in coverage, must constitute the sole basis of relief so that when compensation was limited to the 20% of inmates engaged in prison industries, it was the exclusive remedy, despite the Federal Tort Claims Act which became operative in 1946. That it is absolutely inconceivable, says the government, that when Congress enacted the Federal Tort Claims Act in 1946 and specifically enumerated therein all exceptions to which it did not apply and failed to exclude among the exceptions inmates injured through negligence of the United States of America, that Congress could not have been thinking about the untenable and helpless position in which prisoners have been placed by virtue of the skimpy and abortive relief given them under the Act of 1934.

Furthermore, is it inconceivable that Congress did intend Federal inmates to secure relief under the provisions of the Federal Tort Claims Act, despite its enactment of the Amendment of Section 4126 in 1961.

> "The House Report on the legislation expanding coverage for injuries to prisoners engaged in prison industries noted that no alternative avenues of relief were open, a statement demonstrably true in light of the consistent course of judicial interpretation of the Act. We do not consider that the passage of this remedial legislation, *which is not inconsistent with any tort remedy,*" (emphasis supplied) "should be held to eliminate a prisoner's right to sue under the Tort Claims Act, because a committee of Congress, in reliance on judicial decisions with which we cannot agree, thought that this right did

not exist. Commissioner of Internal Revenue v. Estate of Arents, supra, 297 F.2d at 397." *Winston v. United States,* 305 F.2d 253 at 273.

For all intents and purposes the government is inferentially telling this Court to resolve all doubts against Federal prisoners and to invoke the thesis that Congress intends and desires to stigmatize Federal prisoners and relegate them to inferior status relative to their civil rights for tort liability.

Where Congress has intended a compensation system to be exclusive it has generally said so in the governing statute. See provisions of Federal Employees Compensation Act, 63 Stat. 865 (1949) 5 U.S.C. 757(b); Longshoremen's and Harbor Workers Compensation Act, 44 Stat. 1424 (1927) 33 U.S.C. 905 (1946).

At what point does a compensation act, where other relief exists for tort liability become the exclusive form of relief to the exclusion of all other relief? Is it when any compensation act exists—regardless of how meager and limited?

Is it not reasonable to conclude that Congress intended to provide some form of compensation in circumstances where inmates suffered injury due to no fault of the United States and at the same time permit inmates to seek redress under the Federal Tort Claims Act where such injury was induced by a negligent act of the United States of America.

VI

There is no Simple, Certain Uniform System of Compensation for the Injuries or Death of Federal Prisoners to Evidence the Congressional Intent to Provide An Exclusive Remedy

The compensation scheme for prisoners is very different from the compensation system under the Federal Employees Compensation Act and the compensation system for servicemen which was described in *Feres* as being simple, certain and uniform; nor does it in any way conform with the requirement enunciated in *Johanson v. United States,* 343 U.S. 427, that a compensation system is the exclusive remedy only when it covers all employees in the absence of specific exceptions.

Judge Hincks stated in his opinion in *Winston v. United States,* 305 F.2d 253 at 257 that: "in comparison with the military compensation program 38 U.S.C. 700 (1958), [now 101 (13)], which affords relief for virtually all service-incurred injuries, see 340 U.S. at 145, 71 S. Ct. 163, the prison work-compensation plan is vastly less comprehensive and is in *no real sense a substitute for tort liability.*" (emphasis supplied)

The Prison Compensation Act is vastly different from the right to compensation enjoyed by government employees under the Federal Employees Compensation Act:

1. It is permissive rather than mandatory.

2. The amount of the award rests entirely within the discretion of the Attorney-General, but may not, under the statute, exceed the amount payable under the Federal Employees Compensation Act. For instance, the

Federal Employees Compensation Act sets rigid standards which mathematically determine the amount of recovery while under the prison system the amount of the award is entirely within the discretion of the Attorney General. No more is authorized than under the Federal Employees Compensation Act but no minimum is fixed. Awards have run from $50.00 for the loss of a finger to $4,000.00 for death.[5]

3. Compensation is paid only upon the inmate's release from prison and will be denied if full recovery occurs while he is in custody and no significant disability remains after his release.[6]

4. There is no provision for the claimant to have a personal physician present at his physical examination.[7]

5. There is no opportunity for administrative review.[8]

6. Compensation, even when granted, does not become a vested right, but is to be paid only so long as the claimant conducts himself in a lawful manner and may be immediately suspended *upon conviction of any crime or incarceration in a penal instituiton.*[9]

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5. See Note 63 Yale Law Journal 418-423 (1954).

6. Federal Prison Industries, Inc., Inmate Accident Compensation Regulations, Sec. 11, 28 C.F.R., Sec. 301.1, 301.2.

7. Compare Federal Employees Compensation Act, §21, 5 U.S.C. §771.

8. Compare Federal Employees Compensation Act, § 37, as amended, 5 U.S.C. § 787.

9. Federal Prison Industries, Inc., Inmate Accident Compensation Regulations § 16, 28 C.F.R. § 301.5

7. Compensation is not available to unemployable inmates including the sick, the aged, and those with serious physical and mental handicaps.

8. Compensation is not available to those inmates newly admitted and those in transit from one institution to another.

9. Compensation is not available to inmates confined to penal institution in the District of Columbia which are beyond the reach of 18 U.S.C. 4126.

10. Compensation is not available to inmates engaged in certain types of road construction and in activities which do not relate to prison industry or institutional maintenance.[10]

11. Compensation is not available to inmates as a result of deliberate or intentional attacks of fellow inmates.[11]

12. Compensation is not available for inmates who are loaned to military bases and who are injured while doing work on said bases.[12]

13. Compensation is not available to inmates who may be injured during confinement at any other time than when engaged in performance of prison industry or maintenance activity.

> "What emerges on examination, therefore, is a severely restrictive system of compensation permeated at all levels by the very prison control and

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10. Lack v. United States, 262 F.2d 167.

11. James v. United States, 280 F.2d 428.

12. Seeber v. United States, 2 F. Supp. 68 (Eastern District of Tenn.).

dominion which was at the origin of the inmate's injury. This discretionary and sketchy system of compensation, which would not even have covered the present plaintiff in 1946, may not be deemed the equivalent of compensation under the Federal Employees Compensation Act of 1916." *Demko v. United States,* Appellant, 350 F.2d 698.

The essence of *Johansen* is that the Federal Employees Act is so comprehensive a system of coverage of all government employees that it is presumably intended to be their exclusive remedy.

It is noteworthy that a reference to the factual events involved in the *Feres* case, on which the government places much of its reliance, involving as it did, the death of a soldier as a result of a fire in barracks at Camp Pine, New York, while on active duty, and wherein compensation was awarded,—that such an event would not allow for compensation to inmates in a Federal prison under the Prison Compensation Act unless by sheer coincidence the fire occurred when inmates were engaged in prison industry or maintenance. So that factually no basis of recovery would exist for prison inmates based upon the events of the Feres tragedy.

A Federal prisoner is engaged in his occupation of being a federal inmate 24 hours per day just as a federal employee is committed to his occupation 8 hours a day. If a chandelier were to fall on a federal employee in the Federal Building at Pittsburgh, no doubt exists but that he would be covered under the provisions of the Federal Empolyees Compensation Act. If such an event happened in a Federal penitentiary such inmate injured would not be covered unless by bare coincidence at the time he was engaged in prison industry or maintenance.

So it is if a fire were to occur in the Federal Building at Pittsburgh, federal employees would be covered for injuries which they sustained while on Federal property under the Federal Employees Compensation Act. No such relief would be availible to Federal inmates.

Let us assume that the walls of the Federal penitentiary at Lewisburg were to suddenly collapse during their sleeping hours. Despite the fact that if such an event were to occur involving military personnel the Veterans Compensation Act would cover all soldiers injured, no relief whatver would be available to inmates under the provisions of the Prison Compensation Act.

To say that 18 U.S.C. 4126 provides the benefits and is comprehensive and all inclusive on a parallel with the Federal Employees Compensation Act or the Soldiers Compensation Act, is like saying that a two year old infant is an equal to Joe Louis in the boxing ring.

If Congress were to place Federal inmates under the all embracing and comprehensive provisions of the Federal Employees Compensation Act perhaps the government's argument would be well taken that Congress has provided an exclusive remedy—but to take what the United States Court of Appeals for the Third Circuit aptly describes as a "severely restrictive system of compensation permeated at all levels by the very prison control and dominion which was at the origin of the inmate's injury" a discretionary and sketchy system of compensation—and substitute said system in lieu of rights existing under the provisions of the broad and sweeping Federal Tort Claims Act would certainly do violence to the purport and efficacy of Congressional enactment. Indeed, if Congress intended to render impotent the provisions of the Federal Tort Claims Act

by a feeble and restrictive compensation enactment, it would appear logical that Congress would have clearly expressed such an intent.

VII

Sound Public Policy Militates in Favor of the Right of Prisoners to Seek Relief Under the Federal Tort Claims Act

Sound public policy, as amply demonstrated by Congressional intent, irrefutably supports the right of an inmate to litigate his injury under the Federal Tort Claims. The inmate is in an inferior position—completely at the mercy and whim of prison guards. The prisoner is less able to protect himself from another's negligence than is a private individual. He must live and work under conditions imposed on him. *"The prisoner is permitted to do nothing except under direction of the officers of the prison." Sutherland,* Principles of Criminology 410 (1934) (emphasis supplied). He cannot readily question the instructions of those entrusted with his care and supervision.

What would do more to eliminate sadistic, brutal and inhumane guards from the rosters of federal penal institutions than the realization that to subject inmates to dangerous work assignments without reasonable safeguards normally provided federal employees or any other employees, would subject the government to tort liability?

What would militate more in the direction of normal safeguards, safety devices and responsible supervision than the guiding surveillence of the courts manifested in financial awards commensurate with the degree of injury suffered and predicated upon the law of negligence.

What more glaringly illustrates this truism than the facts of the instant case, wherein the respondent was given a highly dangerous and almost impossible assignment to perform? What federal employee or independent employee, who was not subject to the consequences of prison discipline and acting as a free agent, would have been willing to perform this dangerous assignment without the aid of scaffolding, step ladders or appropriate safety equipment?

The government points out the liberality of the compensation award indicating that $180.00 per month is possibly the maximum respondent would receive under Pennsylvania Workmen's Compensation or similar state statutes. What the government fails to appreciate is that given normal treatment and standards of work which exist in private industry or government, this accident would not have happened.

Since an inmate has no freedom of choice and is permitted to do nothing except under the direction of the officers of the prison, he is a ward of the prison just as a seaman is a ward of the ship requiring unusual care and protection because of the unique position in which he is placed.

CONCLUSION

For the reasons stated, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,
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SUPREME COURT OF THE UNITED STATES

No. 76.—October Term, 1966.

United States, Petitioner, v. Stephen Robert Demko.	On Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

[December 5, 1966.]

Mr. Justice Black delivered the opinion of the Court.

The respondent Demko, a federal prisoner, was seriously injured in 1962 in the performance of an assigned prison task in a federal penitentiary. Shortly afterward he filed a claim for compensation benefits under 18 U. S. C. § 4126. That law, first enacted by Congress in 1934, authorized the Federal Prison Industries, Inc., a federal corporation, to use its funds "in paying, under rules and regulations promulgated by the Attorney General, compensation . . . to inmates or their dependents for injuries suffered in any industry." [1] Under that law and regulations promulgated under it, respondent was awarded $180 per month which was to start on discharge from prison and continue so long as disability continued.[2] After winning this compensation award, respondent brought this action against the United States in the Federal District Court under the Federal Tort Claims Act,[3] alleging that his injury was due to the Government's negligence for which he was entitled to recover

[1] Act of June 23, 1934, c. 736, § 4, 48 Stat. 1211. The Federal Prison Industries was established as a District of Columbia corporation and a "governmental body" to expand an industrial training and rehabilitation program for prisoners initiated by the Act of May 27, 1930, c. 340, 46 Stat. 391.

[2] On August 1, 1966, Federal Prison Industries, Inc., raised respondent's award to $245.31 per month under authority of the Act of July 4, 1966, 80 Stat. 252, amending the Federal Employees Compensation Act, 39 Stat. 742, as amended, 5 U. S. C. § 751 *et seq.*

[3] 28 U. S. C. §§ 1346 (b), 2671 *et seq.*

additional damages under that Act. The United States defended on the single ground that respondent's right to recover compensation under 18 U. S. C. § 4126 was his exclusive remedy against the Government barring him from any suit under the Federal Tort Claims Act. The District Court, holding that compensation under 18 U. S. C. § 4126 was not his exclusive remedy, rejected this defense and accordingly entered a judgment for the respondent against the United States for tort claim damages based on stipulated facts. The Court of Appeals for the Third Circuit affirmed. 350 F. 2d 698. Subsequently the Court of Appeals for the Second Circuit, in *Granade* v. *United States,* 356 F. 2d 837, reached precisely the opposite result holding that a prison inmate, injured in prison employment and eligible for compensation under 18 U. S. C. § 4126, is precluded from suing under the Federal Tort Claims Act. To resolve this conflict we granted certiorari. 383 U. S. 966.

Historically, workmen's compensation statutes were the offspring of a desire to give injured workers a quicker and more certain recovery than can be obtained from tort suits based on negligence and subject to common-law defenses to such suits. Thus compensation laws are practically always thought of as substitutes for, not supplements to, common-law tort actions. A series of comparatively recent cases in this Court has recognized this historic truth and ruled accordingly. *Johansen* v. *United States,* 343 U. S. 427, and *Patterson* v. *United States,* 359 U. S. 495, for instance, are typical of the recognition by this Court that the right of recovery granted groups of workers covered by such compensation laws is exclusive. Such rulings of this Court have established as a general rule the exclusivity of remedy under such compensation laws.[4] In *Johansen* v. *United States, supra,* at 440–441,

[4] The lower federal courts have held, uniformly, that persons for whom the Government has supplied an administrative compensation

this Court stated "where the Government has created a comprehensive system to award payments for injuries, it should not be held to have made exceptions to that system without specific legislation to that effect." Later in *Patterson* v. *United States, supra,* at 496, this Court emphatically refused to abandon the *Johansen* ruling calling attention to the fact that Congresses by specific statute could change the *Johansen* "policy at any time." Consequently we decide this case on the *Johansen* principle that, where there is a compensation statute that reasonably and fairly covers a particular group of workers, it presumably is the exclusive remedy to protect that group.

There is no indication of any congressional purpose to make the compensation statute in 18 U. S. C. § 4126 nonexclusive. It was enacted in 1934, and provided for injured federal prisoners the only chance they had to recover damages of any kind. Its enactment was 12 years prior to the 1946 Federal Tort Claims Act. There is nothing in the legislative history of this latter Act which pointed to any purpose to add tort claim recovery for federal prisoners after they had already been protected by 18 U. S. C. § 4126. Indeed to hold that the 1946 Federal Tort Claims Act was designed to have such a

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remedy are precluded from seeking recovery against the United States for injuries received in the course of their work under the Federal Tort Claims Act, the Jones Act, the Suits in Admiralty Act, or the Public Vessels Act. *Jarvis* v. *United States,* 342 F. 2d 799, cert. denied, 382 U. S. 831; *Rizzuto* v. *United States,* 298 F. 2d 748; *Lowe* v. *United States,* 292 F. 2d 501; *Somma* v. *United States,* 283 F. 2d 149; *Mills* v. *Panama Canal Co.,* 272 F. 2d 37, cert. denied, 362 U. S. 961; *United States* v. *Forfari,* 268 F. 2d 29, cert. denied, 361 U. S. 902; *Balancio* v. *United States,* 267 F. 2d 135, cert. denied, 361 U. S. 875; *Aubrey* v. *United States,* 254 F. 2d 768; *United States* v. *Firth,* 207 F. 2d 665; *Lewis* v. *United States,* 190 F. 2d 22, cert. denied, 342 U. S. 869. See also *Gradall* v. *United States,* 329 F. 2d 960, 963; *Denenberg* v. *United States,* 305 F. 2d 378, 379–380.

supplemental effect would be to hold that injured prisoners are given greater protection than all other government employees who are protected exclusively by the Federal Employees Compensation Act,[5] a congressional purpose not easy to infer.

The court below refused to accept the prison compensation law as an exclusive remedy because it was deemed not comprehensive enough. We disagree. That law, as shown by its regulations, its coverage and the amount of its payments to the injured and their dependents, compares favorably with compensation laws all over the country.[6] While there are differences in the way it protects its beneficiaries, these are due in the main to the differing circumstances of prisoners and nonprisoners. That law, as the Solicitor General points out, offers far more liberal payments than many of the state compensation laws, and its standard of payments for prisoners rests on the schedules of payment of the Federal Employees Compensation Act which Congress has provided to take care of practically all government employees. This particular federal compensation law, created to meet, in the accepted fashion of such laws, the special need of a class of prisoners, has now for more than 30 years functioned to the satisfaction of Congress, except as Congress broadened its coverage in 1961.[7] Until Congress decides differently we accept the prison compensation law as an adequate substitute for a system of recovery by common-law torts.

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[5] 39 Stat. 742, as amended, 5 U. S. C. § 751 *et seq.*

[6] The regulations governing awards of workmen's compensation to federal prisoners appear at 28 CFR §§ 301.1–301.10 (1965 rev.).

[7] In 1961 Congress expanded the coverage of 18 U. S. C. § 4126 to include not only prisoners' injuries suffered in "any industry" but also in "any work activity in connection with the maintenance or operation of the institution where confined." Act of September 26, 1961, 75 Stat. 681, 18 U. S. C. § 4126.

The court below was of the opinion that its holding was required by *United States* v. *Muniz*, 374 U. S. 150. We think not. Whether a prisoner covered by the prison compensation law could also recover under the Federal Tort Claims Act was neither an issue in nor decided by *Muniz*. As our opinion in *Muniz* noted, neither of the two prisoners there was covered by the prison compensation law. What we decided in *Muniz* was that the two prisoners there involved, who were not protected by the prison compensation law, were not barred from seeking relief under the Federal Tort Claims Act. However, that is not this case. The decision in *Muniz* could not possibly control our decision here because respondent is protected by the prison compensation law.[8] All other arguments of respondent have been considered but we find none sufficient to justify recovery under the Federal Tort Claims Act. The judgments of the courts below are reversed with direction to sustain the Government's defense that respondent's recovery under the prison compensation law is exclusive.

Reversed.

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[8] In this case, the Government stipulated that respondent's "right to compensation pursuant to 18 U. S. C. § 4126 is not affected by this suit. Regardless of the outcome of this suit [respondent] will have the same right to compensation as if suit had not been instituted."

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SUPREME COURT OF THE UNITED STATES

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United States, Petitioner, *v.* Stephen Robert Demko.	On Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

[December 5, 1966.]

Mr. Justice White, whom Mr. Justice Douglas joins, dissenting.

United States v. *Muniz*, 374 U. S. 150, held that action under the Federal Tort Claims Act was available to federal prisoners injured by the negligence of government employees. Given that case, the respondent, who was injured by government negligence while a federal prisoner, is entitled to relief unless the compensation available to him under 18 U. S. C. § 4126 is his exclusive remedy, a proposition which rests on the intent of Congress to give § 4126 that effect. Certainly the section does not in so many words exclude other remedies; and in my view exclusivity should not be inferred, for § 4126 is neither comprehensive nor certain and does not meet the tests of *Johansen* v. *United States*, 343 U. S. 427, and of *Patterson* v. *United States*, 359 U. S. 495. Section 4126 permits, but does not require, the application of prison industries income to some form of compensation scheme. The scheme adopted by the Attorney General applies to only a limited class of prisoners—those doing prison industry, maintenance, or similar work. A prisoner injured in prison industry work gets no compensation under the plan until he is released and none then if he has completely recovered. Furthermore, his payments stop if he is reincarcerated. If he dies while in prison, he gets nothing at all. On the other hand, if a prisoner is injured by the negligence of a prison guard and is not covered by the § 4126 plan, he may sue and

recover under the Tort Claims Act. Recovery is his and when he gets it, he keeps it whether or not he dies before his prison term expires and whether or not he is released and then again imprisoned.

Essentially, I agree with Judge Freedman, who wrote the opinion for the Court of Appeals for the Third Circuit. The following is a passage from his opinion:

> "Congress in adopting the amendment of 1961 to § 4126 gave no express indication that the compensation authorized by it was to be exclusive, and its provisions preclude the imputation of any such intention. The compensation scheme for prisoners is very different from the compensation system for servicemen which was described in *Feres* as being 'simple, certain, and uniform' (340 U. S., at 144) at the time the Federal Tort Claims Act was passed in 1946. It is also vastly different from the right to compensation enjoyed by government employes under the Federal Employees' Compensation Act. It is permissive rather than mandatory. The amount of the award rests entirely within the discretion of the Attorney General, but may not under the statute exceed the amount payable under the Federal Employees' Compensation Act. Compensation is paid only upon the inmate's release from prison and will be denied if full recovery occurs while he is in custody and no significant disability remains after his release. There is no provision for the claimant to have a personal physician present at his physical examination, and there is no opportunity for administrative review. Finally, compensation, even when granted, does not become a vested right, but is to be paid only so long as the claimant conducts himself in a lawful manner and may be immediately suspended upon conviction of any crime, or upon incarceration in a penal institution.

> "What emerges on examination, therefore, is a severely restrictive system of compensation permeated at all levels by the very prison control and dominion which was at the origin of the inmate's injury. This discretionary and sketchy system of compensation, which would not even have covered the present plaintiff in 1946, may not be deemed the equivalent of compensation under the Federal Employees' Compensation Act of 1916. Nowhere can there be found any indication that Congress intended that it should serve to exclude prisoners from the broad and sweeping policy embodied in the Federal Tort Claims Act." 350 F. 2d 698, 700–701. (Footnotes omitted.)

Nor does respondent claim the right to cumulate his remedies; he concedes that recovery under the compensation scheme must be offset against any negligence award he would otherwise receive.

Respectfully, I dissent.